IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 2 OF 1989

Nizam Babubhai Mulla .. Applicant

versus

The State of Maharashtra .. Respondents

...

Mr.Nitin Pradhan with Ms.S.D. Khot for the applicant.

Mr.D.P. Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 22nd November 2004.

ORAL JUDGEMENT:-

1. Heard the learned counsel appearing on behalf of the appellant and the learned APP appearing on behalf of the State.

2. The appellant is challenging the judgment and order passed by the third Addl. Sessions Judge, Sangli in Sessions Case no.59 of 1988. By the said

judgement and order dated 31st December 1988, the trial Court convicted the appellant original accused for having committed the offences punishable u/s.17 and section 20(b)(1) of the NDPS Act and he was sentenced to suffer RI for 10 years and to pay fine of Rs.50,000/- and in default to suffer SI for one year.

3. The accused was charged by the trial Court for having committed an offence punishable u/s.17 and 21 contravening the provisions of section 8C of the NDPS Act. The incident in question took place on 19th August 1987. The prosecution case is that Yeshwant Gaikwad, Inspector, Central Excise and Customs received information on 18th August 1987 that the accused was dealing in Ganja and opium at village Palus. He conveyed this information to the Superintendent Shri Walujkar. Pursuant to the information received, Walujkar recorded the said information in his register and informed the Asstt.Collector, obtained a search warrant and he along with Gaikwad and other staff members went to Village Palus at about 5.00 p.m. along with two panchas. The search warrant was shown to the accused and one black bag was found on the first floor in which there was one polythene bag and small packet of

loose ganja and opium was found. Clothes were taken and contraband articles were attached, labelled and sealed. The accused was brought to Sangli and the two sample packets were sent to the Chemical Analyser. Report was received that the sample contained ganja. However, report regarding opium could not be given as the sample was said to be insufficient for the purpose of arriving at any conclusion. Complaint was filed by Walujkar who was the Superintendent at that time. The matter was committed to the Sessions Court. Charge was framed. The accused pleaded not guilty to the said charge. The prosecution examined six witnesses. The trial Court on the basis of the evidence adduced by the prosecution convicted the accused and sentenced him to suffer RI for 10 years. Against the said judgement and order, the present appeal has been filed. Shri Pradhan, the learned counsel appearing on behalf of the accused submitted that there was non compliance of provisions of section 42. Further, there was a clear non compliance of the provisions of section 55 and section 57 of the NDPS Act. He submitted that from the evidence of PW no.1 and PW no.8, it was evident that the provisions of section 42(1) has not been complied. He submitted that from the evidence of PW no.2, it was abundantly clear that

the panchnama regarding the seizure of the contraband articles had commenced in the absence of the accused and the accused had come subsequently in the said house and that his signature was taken instead of taking the signature of the owner of the house. He submitted that the prosecution did not declare the said witness as a hostile witness and even though the witness was cross-examined by the prosecution they were not in a position to demolish the statement made by him regarding the absence of the accused during the the search. He submitted that this evidence therefore will have to be relied upon in favour of the accused appellant, in order to establish the fact that the accused was not present at the time of the search and seizure of the contraband articles. He further submitted that from the perusal of the Chemical Analyser's report, it could be seen that the sample was seized on 19th August 1987. It was kept with Walujkar in his own custody on 1st September 1987 and thereafter, it was sent on 1st September 1987 with a forwarding letter to the Chemical Analyser. He submitted that no explanation was offered as to why the said contraband was kept in his personal custody instead of keeping it in the police station. It was submitted that no explanation was given by Walujkar PW

no.8 as to why no report was made to the Magistrate as required u/s.57 of the NDPS Act. He submitted that this was a serious lapse on the part of the prosecution and there was a non compliance of section 55 and 57. He further submitted that the information which was reduced in writing was very vague and there was a total non application of mind regarding the recording of the information received. He submitted that so far as the premises which was searched by the concerned Officers, it was a residential premises and not a shop. In fact, on the same day one S.A. Patil, Superintendent had taken search of a shop which was mentioned on the earlier column of the same register and mechanically the same had been reduced in writing in the same register. He submitted that apart from other aspects this clearly showed not only non application of mind but also showed that there was enough reason to believe that no reliance could be placed on the said register regarding the search and seizure. He submitted that there was a non compliance of section 42(1) and (2). He submitted that search warrant was not produced on record and this created a doubt regarding the entire testimony of PW nos.1 and PW no.8 regarding the search and seizure of the contraband articles. He further submitted that the

house infact was in the name of the father of the accused who was admittedly bed-ridden and the name of the accused was obviously added as an after thought though he was not the owner of the house.

4. The learned APP appearing on behalf of the State submitted that issuance of search warrant was not necessary for the purpose of taking search and seizure as is evident from the provisions of section 42 of the said Act. He submitted that under the provisions of section 42 even without obtaining search warrant, the concerned Officer who had personal knowledge or had received information could take search of the premises without a warrant. He submitted that the contraband was found in the house when the accused was present in the house during the search and seizure and therefore, presumption was raised against the accused, which had not been rebutted. He submitted that the trial Court had considered the evidence on record and had given cogent reasons for arriving at a conclusion that the appellant had committed the said offence. He submitted that there was no reason to interfere with the said judgement and order passed by the trial Court.

5. In the present case, prosecution has examined 8 witnesses and the contraband article ganja was found in the house admittedly owned by the father of the accused. PW no.1 has stated in his evidence that he had received information that one Mulls at Palus was dealing in ganja and opium. He therefore passed on information to Superintendent Walujkar PW no.8 to discuss the matter with the Asstt. Collector and with the help of two panchas, they raised the place. Search warrant was shown to the accused, his signature was obtained and on the first floor, the contraband was found. In the cross examination, this witness has admitted that when his statement was recorded by the Superintendent he had not submitted his written information. He has admitted that in his statement, he had not stated that he had given the written information. He has further admitted that he did not know the names of the adjoining owners of the house which was raided nor had he collected information about the house number and the owner of the house before obtaining the search warrant. He further candidly admitted that he did not know the number of the house which was raided. PW no.8 Narayan Walujkar

was serving as a Superintendent in central Excise at Sangli. He has stated in his evidence that PW no.1 Yeshwant Gaikwad had given him information on 19.8.1987 that one Nizam Ali Mulla was dealing in ganja and thereafter, he had informed the Asstt.Collector and had obtained the search warrant from the Asstt. Collector to search the house of the appellant accused and thereafter, they had proceeded along with the panchas. This witness has stated that after the search was conducted, the contraband was found on the first floor which was seized and was sent to the Chemical Analysers and he had kept the muddemal in his custody since he was in charge of the godown. This witness does not state that why he had kept the said muddemal for a period of 12 days in his custody and why he had not informed the Magistrate as required u/s.57 of the NDPS Act. This witness also has not produced the copy of the search warrant or any other document to show that he had applied for a search warrant and that the Asstt. Collector had infact issued the search warrant. From the register which is maintained by this witness which is produced by the prosecution at Exhibit-19, it can be seen that no particulars regarding the information received has been mentioned and the register merely mentions that

"regarding Narcotic Drugs". The register also records that after search was taken, ganja and opium was seized from the shop when infact the premises was a residential house. It is no doubt true that the provisions of section 42 have been held to be not mandatory but directory and the Apex Court has consistently taken a view that mere non compliance of the provisions of section 42(1) and (2) would not vitiate the trial but an adverse inference would be drawn in the event of non compliance of section 42.

6. In the present case, the prosecution in the evidence of PW nos.1 and 8 has come out with a case that they had obtained a search warrant from the Asstt. Collector. Section 41 of the NDPS Act lays down the procedure for obtaining the search warrant. Section 42 of the Act prescribes the procedure of taking search without obtaining a search warrant. In the present case admittedly, the search warrant has not been produced by the prosecution. The version of the prosecution becomes very doubtful particularly when the search warrant is not produced on record. The prosecution could have very well taken the search of the premises without obtaining a search warrant as laid down u/s.42 after information which was received

was reduced in writing. The information which was reduced in writing in the present case does not disclose the name of the accused nor does it describe the place where the said contraband was concealed. This further creates a doubt regarding the prosecution case. The prosecution also has not obtained extract of the ownership of the house of the accused. Admittedly, the house where the contraband was seized was owned by the father of the accused. It has come on record that the accused was one of the occupants of the said house. IN my view, this is a clear case where there is a complete non compliance of section 42(1) and (2).

7. The second question which falls for consideration is whether there is a non compliance of section 55 and 57 of the NDPS Act. Section 55 and 57 reads as under:-

> **55. Police to take charge of articles seized and delivered** - An officer in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the

Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station.

57. Report of arrest and seizure - Whenever any person makes any arrest or seizure under this Act, he shall, within fortyeight hours next after such arrest or seizure, make a full report of all the particulars of such arrest of seizure to his immediate official superior.

From the perusal of the said section, it can be seen that a duty is cast on the Officer in charge of the

police station to take charge and keep all articles seized in safe custody within the local area of that police station. He is also under an obligation to affix his seal to such articles or to take samples from them and further seal such samples with the seal of the Officer in charge of the police station. Thereafter, u/s.57, the Officer in charge of the police station is bound to make a report of any arrest or seizure under the Act to his immediate Official superior within a period of 48 hours.

8. The intention of the legislature is clear from the wording of the section and a duty is cast on the police Officer in charge of the police station to keep the seized articles in safe custody and immediately report the seizure and arrest to his immediate superior Officer within 48 hours. Obviously, these provisions are intended to keep a check on officers who seize the contraband or arrest the accused and further to ensure that there is no tampering of the contraband which is seized by the Officers. It is the duty of the Officer to comply with the conditions which are imposed in the said section. It is no doubt true that the provisions of these sections are directory and not mandatory and that the violation of

these provisions does not vitiate the trial or conviction. Yet, a failure on the part of the Investigating Agency on complying with these provisions would have a bearing on the appreciation of evidence regarding the arrest of the accused or seizure of the articles.

9. In the present case, PW no.1 Yeshwant Pandurang Gaikwad who was working as an Inspector of Central Excise and Customs on the date of the incident has nowhere stated that the procedure as prescribed u/s.55 and 57 was followed after the seizure of the contraband. Similarly, PW no.8 Shri Walujkar was a Superintendent at the relevant time also has no where stated in his evidence that after the contraband was seized, it was kept in safe custody in the police station or that information about the seizure was given to his immediate superior Officer. On the contrary, the evidence on record clearly shows that the contraband was seized on 19th August 1987 and it was in the possession of PW no.8 Walujkar till 1.9.1987. No explanation has been offered or given as to why the said contraband was not deposited in the police station. PW no.8 has clearly stated that since he was in charge of the godown, he had kept the

muddemal in his custody. Thus, from the evidence of PW nos.1 and 8, it is clear that the provisions of section 55 and 57 have not been followed and there is a clear non compliance of the said provision. This creates considerable doubt and the possibility of tampering with the contraband is not ruled out.

10. Apart from that, one of the panch witness has turned hostile and other panch witness PW no.2 Vinayak Pandit has stated in his evidence that the accused was not present initially when the Officer of the Excise Department started taking search of the house. this witness was not declared as hostile. However, the Court permitted the APP to ask leading questions to him. Thereafter in cross-examination this witness has admitted that the signature of the accused was taken instead of taking the signature of Balu Ali Mulla. He has stated that this was done because the said Balu Mulla was bed ridden and was unable to come down. The evidence of this witness demolishes the prosecution case that the search warrant was shown to the accused and that accused was present in the house from beginning till end of the search. The prosecution has also not brought on record the documents regarding the ownership of the house and therefore, it cannot be

said that the accused was either the owner of the house or the occupier of the house.

11. The trial Court in my view has clearly erred in coming to the conclusion that the prosecution has proved a case against the accused beyond reasonable doubt. For the aforesaid reasons, the judgement and order of the trial would have to be set aside and the accused is acquitted of the offence with which he is charged and judgement and order of the trial Court is set aside. The accused is on bail. His bailbonds to stand cancelled.

V.M.KANADE, J